UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

ADVANCEPIERRE FOODS, INC.

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 75, AFFILIATED WITH THE UNITED FOOD AND COMMERCIAL WORKERS, INTERNATIONAL UNION

Cases 09-CA-153966
09-CA-153973
09-CA-153986
09-CA-154624
09-CA-156715
09-CA-156746
09-CA-159692
09-CA-160773
09-CA-160779
09-CA-162392

COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S CROSS-EXCEPTIONS

I. INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel hereby submits its reply to Respondent's answer to the General Counsel's cross-exceptions to the Administrative Law Judge's decision. For the reasons set forth herein, and in the General Counsel's August 29, 2016 cross-exceptions, Respondent's arguments should be rejected and the General Counsel's cross-exceptions should be granted.

II. THE ADMINISTRATIVE LAW JUDGE ERRONEOUSLY FAILED TO FIND THAT RESPONDENT UNLAWFULLY SOLICITED EMPLOYEES TO WITHDRAW UNION AUTHORIZATION CARDS

In its answering brief, Respondent maintains that it was permitted to disseminate the anti-union literature at issue in this case. While it argues that Director of HR Renee Chernock testified that employees asked how they could withdraw their authorization cards, Chernock did not attend the meetings at which Respondent disseminated the anti-union literature and solicited

employees to revoke their authorization cards. No employees testified to asking about revoking their union authorization cards at these meetings. No employees testified to hearing any other employees asking about revoking their union authorization cards. To the contrary, employees Ronnie Fox, Kevin Favors, and Sonia Guzman all testified that Respondent's solicitation came unprompted. [1]/ (Tr. 130, 270-271, 318-319) Moreover, Chernock did not give any details concerning the alleged employee inquiries, including names of employees who allegedly asked how they could withdraw their authorizations. Thus, Chernock's self-serving and hearsay testimony on this subject should be disregarded.

Respondent argues that the General Counsel fatally failed to put on evidence that none of Respondent's 590 employees asked to have their union authorization cards revoked. Respondent misapplies the burden in this case. The General Counsel's witnesses testified that information about card revocation was not given in response to any questions from employees at the various meetings they attended. As such, and because it was Respondent's defense that it was responding to employee concerns, Respondent bore the burden to call witnesses to testify contrary to the General Counsel's witnesses. It failed to call any witnesses to testify about what happened at the meetings at which the union literature was disseminated. Notably, several line supervisors testified at the hearing. None denied Fox, Favors, or Guzman's accounts in this regard.

Even assuming Chernock was asked how to revoke union authorization, Respondent could, and indeed should, have provided that information directly to the employees who asked rather than widely disseminating that information to the entire workforce. In this regard, the

[1]/ References to the Administrative Law Judge's Decision will be designated as (ALJD ____); references to Respondent's exceptions and brief in support thereof will be designated as (R. Except. ____) and (R. Br. _____) respectively; references to the trial transcript will be designated as (Tr. ____); references to the General Counsel's exhibits will be designated as (GC ____); references to Respondent's exhibits and the Union's exhibits are designated as (R __) and (U ____), respectively; and references to joint exhibits will be designated as (JX____).

cases cited by Respondent in its answering brief are distinguishable from the present case.

With respect to the chill created by Respondent's unfair labor practices in this case, Respondent misreads the General Counsel's argument based on *Space Needle LLC*, 362 NLRB No. 11 (Jan. 30, 2015). Here, Respondent's solicitation of union authorization revocation occurred in an atmosphere wherein, objectively, employees would tend to feel peril in refraining from revoking their authorization cards. This is, in part, due to the inherently chilling nature of targeting employees regarding their authorization to work in the United States, in a workplace with a large immigrant population. The General Counsel does not argue that targeting employees in this way was subjectively chilling on the employees in this facility and it is not its burden to do so. Rather, such immigration-related threats would, and did, inherently and objectively create an environment wherein employees would feel peril in not revoking their cards. Thus, it is not necessary for the General Counsel to produce evidence of any actual chill. [2]/ Given that the revocation solicitations occurred in this atmosphere tainted by its unfair labor practices, they were unlawful.

Finally, Respondent chastises the General Counsel for not citing case law in support of its contention that it is not categorical that a union must return authorization cards if asked, as Respondent falsely informed its employees. Notably, Respondent did not cite any case law indicating that unions *were* under any such obligation to return authorization cards. *R.L. White Company, Inc*., 262 NLRB 575, 576 (1982), cited by Respondent, states only that an employer may lawfully inform employees of their right to request their cards back, and does not falsely state an obligation by a union to return such cards. In *R.L. White*, the revocation solicitation language at issue stated that "Some unions will not return signed authorization cards once they

[2]/ Indeed Respondent misconstrued the General Counsel's attempts to address such evidence as a concession that it bore the burden to do so. In fact, the General Counsel sought to elicit such testimony to support its underlying 10(j) petition and the Administrative Law Judge denied its attempts. (Tr. 106-107)

have them. I don't know what Local N-19 would do . . . " prior to informing employees how they can request the cards. *Id*. at 576. Here, by falsely telling employees that "if you signed a union card and want to withdraw your support, the union must give it to you," (Tr. 634, JX 1) and "if you signed a card and want to withdraw your support, the UFCW must give it to you" (emphasis in original) (GC 29), Respondent was exceeding the protections of Section 8(c) of the Act because the statement was not based on objective fact. Given the false nature of this statement, Respondent is not protected here by Section 8(c), and the documents seeking withdrawal of union support are violative of Section 8(a)(1) of the Act.

II. THE GENERAL COUNSEL DID NOT WAIVE THE ALLEGATION CONCERNING THAT GUZMAN WAS UNLAWFULLY INTERROGATED

The allegation that Sonia Guzman was unlawfully interrogated is alleged in paragraph 5(f) of the General Counsel's third consolidated complaint. This is separate from and in addition to the interrogation of Carmen Cotto, which is alleged in paragraph 5(e) of the complaint. The General Counsel presented evidence, by Sonia Guzman's testimony, about the interrogation. At no time did the General Counsel withdraw or amend out allegation 5(f). Thus, the General Counsel did not abandon or waive this allegation, and the Administrative Law Judge erred in not finding a violation of Section 8(a)(1) of the Act in this interrogation.

IV. RESPONDENT DID NOT MEET ITS BURDEN OF SHOWING THAT IT WOULD HAVE ANNOUNCED AND IMPLEMENTED A WAGE INCREASE BUT FOR THE UNION ACTIVITY

In its answering brief, Respondent argues that, because it planned wage evaluations before the union organizing campaign, it could not have announced and implemented the wage increase in response to union activity at its Cincinnati plant. This ignores the speculative nature of such an evaluation. The wage evaluations were just that - an analysis of wages - and not a plan on what to do with respect to wages at the Cincinnati plant. Moreover, Respondent failed

to introduce the content or results of such an analysis, and it is, undisputed that the wage evaluation project was abandoned for some time. (Tr. 975) Respondent then spent a significant amount of time - months - classifying employees and dealing with non-wage-related matters. (Tr. 983) Respondent was still only studying the market, so wage decisions could not have yet been made. At the time Respondent announced the wage increase at its Cincinnati plant, the wage rates that employees would receive were not even finalized, as Respondent was only beginning to do the cost analysis and to check employee job classifications. (Tr. 552, 1000, 1001) Thus, the wage rate was not, as the Administrative Law Judge mischaracterized it, "developed" before the union organizing campaign, (ALJD 1:33-34) and both the announcement and the implementation of the raise are unlawful.

Respondent relies on the fact that other plants received wage increases at the same time as the Cincinnati plant to defend its actions. However, it failed to produce evidence about the magnitude of those raises compared to the Cincinnati plant. Not all of Respondent's employees received a raise. (Tr. 1007) However, all but eight employees at the Cincinnati plant received this unprecedented raise. (Tr. 498, 580, 1002, JX 1)

With respect to Chuck Aardema's email which stated that the "communications on the new salary structure . . . should provide a positive boost for those in the Cincinnati plant," (GC 59) the Administrative Law Judge acknowledged that it was "likely – perhaps obvious – that the union was a reason that Aardema and other top management wanted the wage reevaluations completed and implemented earlier rather than later." (ALJD 49, pp. 1-3) Thus, Aardema's statement in the same email that the wage increase was "not related to the union situation" is self-serving and contrary to the Judge's findings. Given the above and also for the reasons stated in General Counsel's August 29, 2016 cross-exceptions, the Administrative Law Judge incorrectly concluded that Respondent met its burden to show that it would have

implemented the wage increase even in the absence of union activity, and also erred in finding that Respondent proved that it had a legitimate business reason for announcing the wage increase on July 15, 2016 when the increases were not yet finalized.

V. SPECIAL REMEDIES ARE WARRANTED IN THIS CASE AND DIANA CONCEPCION IS ENTITLED TO ANY CONSEQUENTIAL DAMAGES

Respondent dismisses as irrelevant the inherently chilling nature of targeting employees regarding their authorization to work in the United States in determining whether special remedies are warranted. In doing so, Respondent misconstrues the General Counsel's argument. The General Counsel contends that such a threat, as it was directed to Diana Concepcion and disseminated throughout the facility, would inherently and objectively create an environment wherein employees would feel peril, and thus necessitate special remedies. Thus, evidence of subjective chill is unnecessary. In requesting additional work authorization documentation from Concepcion, Respondent was, contrary to the Administrative Law Judge's assertion, stoking immigration-related fears, and for this reason, and the reasons detailed in the General Counsel's cross-exceptions, special remedies requested by the General Counsel are warranted.

Contrary to Respondent's assertions, Diana Concepcion is due both backpay and consequential damages. Respondent was correctly foreclosed from questioning Concepcion about her immigration status. Respondent's questioning of Concepcion's immigration status goes to the heart of its unlawful conduct, as the Administrative Law Judge found that Respondent had an unlawful motive for requesting such documentation and peering into Concepcion's background and work authorization. The request for additional documentation itself, in retaliation for Concepcion's real or perceived union support, is an unfair labor practice. There is no evidence that Concepcion is undocumented, and allowing Respondent to continue to

probe into her work authorization (which she provided and which was accepted at her time of hire) would support Respondent in continuing in its unlawful harassment of Concepcion in retaliation for her union support.

Finally, while Respondent maintains that current Board law does not permit consequential damages as requested by the General Counsel, in *Goodman Logistics, LLC*, 363 NLRB No. 177 (2016), cited by Respondent, the Board declined to rule on the appropriateness of awarding consequential damages because the issues had not been fully briefed by the affected parties. Here, the issue has been fully briefed, and Concepcion should receive any compensatory damages as described in the General Counsel's cross-exceptions.

VI. CONCLUSION

For the reasons above, as well as the reasons articulated in the General Counsel's August 29, 2016 cross-exceptions, the General Counsel's cross-exceptions should be sustained, and that the Administrative Law Judge's findings to the contrary should be rejected or modified in conformity, including his Order and Notice to Employees.

Dated: September 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

September 22, 2016

I hereby certify that I served the attached Counsel for the General Counsel's Reply Brief to Respondent's Answering Brief to the General Counsel's Cross-Exceptions on all parties by mailing true copies thereof by electronic mail today to the following at the addresses listed below:

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